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IN THE

Supreme Court of the United States

October Term, 1987

NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, AND THE BIPARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation?

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No.

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NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, AND THE BIPARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Pennsylvania State Representatives Nicholas Colafella, K. Leroy Irvis, James J. Manderino, Matthew J. Ryan, and the Bipartisan Committee for the Administration of the House of Representatives, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered on June 9, 1987.

OPINIONS BELOW

The June 9, 1987 Opinion of the United States Court of Appeals for the Third Circuit is reported at 821 F.2d 946 and is reprinted in Appendix A hereto at 1a.

The January 31, 1986 Memorandum Opinion and Order of the United States District Court for the Middle District of Pennsylvania granting in most respects Petitioners' motion to quash are reported at 626 F.Supp. 1319 and are reprinted in Appendices B and C hereto, respectively, at 24a and 41a.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 9, 1987. The Court of Appeals denied a timely petition for rehearing on July 6, 1987. On August 24, 1987, Justice Brennan signed an Order requiring this petition to be filed on or before October 4, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This litigation stems from service of a federal grand jury subpoena *duces tecum* on Pennsylvania State Representative Nicholas Colafella. At the time the subpoena was served, Representative Colafella was Chairman of an ongoing investigative committee, the Select Committee to Investigate Compliance with the Steel Products Procurement Act (the "Select Committee" or "Committee"). The Select Committee, which was three years into an investigation of the Pennsylvania State Capitol Building expansion project, was comprised of members of the House of Representatives of the General Assembly of the Commonwealth of Pennsylvania.

The investigation consisted of fact-finding by Committee members, staff and investigators. Witnesses were interviewed and called to appear before the Select Committee.

After the Committee received the sworn public testimony of Pennsylvania Secretary of General Services Walter Baran, whose actions were being scrutinized for propriety and legality, Secretary Baran requested the United States Attorney for the

Middle District of Pennsylvania to investigate the same alleged improprieties that were the subject of the Committee's investigation. Appendix B at 25a. Shortly thereafter, the United States Attorney commenced this grand jury investigation.

Prior to service of the subpoena, Committee Chairman Colafella and Committee Counsel Reizdan Moore met with the United States Attorney and agents from the Federal Bureau of Investigation and gave them names of witnesses, information and leads to investigate, but would not give them information that was to be made public at hearings in the next two weeks. Shortly after these discussions, on January 15, 1986, the United States Attorney caused the subpoena to issue, even though the Committee voluntarily provided substantial information to the F.B.I. prior to issuance of the subpoena, the information sought was readily available from sources other than the Committee; and the sources were accessible to the F.B.I., but apparently not exploited. Appendix B at 39a.

The United States Attorney stipulated before the District Court, and the District Court found, that no member of the state legislature was a subject or target of the federal investigation. Appendix B at 32a.

The subpoena, which was served and compelled compliance during the ongoing legislative investigation, demanded the totality of the Committee's investigative records. The subpoena commanded production of:

> All records in your care, custody and control relating to an investigation of the purchase of granite use [sic] in the Capitol addition project as follows:
>
> 1. Memos, reports, summaries, interview notes, record review notes, correspondence and any other documents of an investigative nature compiled, adopted, prepared or sent and received by any committee investigator including, but not limited to, the listed individuals and companies named on the attached list.

> 2. Agenda, minutes, summaries and all transcripts of public and private hearings, along with copies of all documents or exhibits referred to in said transcripts summaries, agenda or minutes during testimony or in comments by committee members or staff.

The subpoena sought all records and documents relating to twenty-three companies and individuals, including Committee Counsel.

On January 17, 1986, a motion to quash the subpoena was filed on behalf of: Nicholas Colafella, Chairman of the Select Committee; K. Leroy Irvis, Speaker of the House; James J. Manderino, Majority Leader of the House; Matthew J. Ryan, Minority Leader of the House; and the Bipartisan Committee for the Administration of the House of Representatives, all Petitioners herein. 28 U.S.C. §1331 conferred jurisdiction on the District Court.

Petitioners argued to the District Court that the Select Committee enjoys an immunity protecting it from forced disclosure of documents and information based on the policies underlying the Speech or Debate Clause of the United States Constitution. Petitioners urged that the same policies supporting the federal legislators' speech or debate immunity, to-wit, the need for legislators to be free from threats, harassment, distraction, disruption and burdensome inquiry, also support application of the immunity to state legislators.

On January 31, 1986, the District Court granted much of the requested relief and ordered that the subpoena be quashed in most respects. *See* Appendices B and C. The court held that Petitioners were entitled to invoke the federal common law immunity from the effects of the grand jury subpoena, the immunity being based on the principles of federalism and the policy considerations which support the Speech or Debate Clause of the United States Constitution. The District Court ordered as follows:

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT the Motion to Quash Subpoena is granted, EXCEPT with respect to the following materials:

1. The identities of all witnesses;

2. Any exhibits or documents of which the grand jury may become aware, in the course of its investigation, authored by witnesses or by third parties other than the Committee or its members, which are in the possession of the Committee and which cannot be obtained from any other source.

With respect to this information, the subpoena, as modified, shall be enforced.

Appendix C.

The United States appealed the District Court's order to the United States Court of Appeals for the Third Circuit. On June 9, 1987, a panel of the Third Circuit reversed the District Court's decision and remanded for proceedings consistent with its opinion. *See* Appendix A.

In so ruling, the Court of Appeals refused to recognize either an absolute legislative immunity sought by the legislators or a qualified privilege recognized by the District Court as protecting the investigative committee, relying in large part on *United States v. Gillock*, 445 U.S. 360 (1980). The Court of Appeals concluded that the interests in preventing intrusion into the legislative process and protecting legislative independence did not justify protection.

On July 6, 1987, the Court of Appeals denied Petitioners' timely petition for rehearing. On July 14, 1987, the Court of Appeals stayed issuance of the mandate in this case until October 5, 1987, upon Petitioners' representation of an intention to file a petition for a writ of certiorari with this Court. On August 24, 1987, Justice Brennan ordered that the petition be filed on or before October 4, 1987.

REASONS FOR GRANTING THE WRIT

This Court should review this case for three reasons. First, the case presents an important question of federal law which has not been, but should be, settled by this Court, specifically: Whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation? Second, the decision of the Court of Appeals in refusing to recognize the immunity is inconsistent and conflicts with decisions of the United States Courts of Appeals for the First and Second Circuits. Finally, the decision of the Court of Appeals misconceives the meaning and misapprehends the scope of *United States v. Gillock*, 445 U.S. 360 (1980), the implications of which are in need of clarification by this Court. For these reasons, review by this Court of this fundamental question of the existence of and necessity for legislative immunity and its special value in our system of government is warranted.

A. This case presents an important question of federal law which has not been, but should be, settled by this Court.

The issue involved in this case is neither academic nor episodic; nor is it peculiar to Petitioners. As this petition and the anticipated *amicus curiae* briefs point out, this case presents a fundamental and recurring question concerning legislative immunity of importance to legislatures across the nation.[1] The Court of Appeals refused to recognize the long-established doctrine of legislative immunity as protecting an ongoing investigative committee of a state legislature from forced disclosure of documents to a federal grand jury. The Court of Appeals' decision casts grave doubt on the continued free exercise of state

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1. Petitioners anticipate the filing of *amicus curiae* briefs supporting this petition by the National Conference of State Legislatures as well as a number of state legislatures individually. The *amicus* briefs will establish the recurring nature of federal interference with legislatures in states other than Pennsylvania and the importance of the immunity to each *amicus*.

legislative functions and the independence of state legislatures nationally. It is an affront to the integrity of the state legislative process.

Legislative immunity occupies an integral and hallowed place in our republican form of government as the guarantor of legislative independence. In *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951), this Court stated that the doctrine of state legislative immunity "was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." The Court reiterated the reason for the immunity:

> The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." II Works of James Wilson (Andrews ed. 1896) 38.

Id. at 373. As restated by this Court in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731 (1980): "The purpose of this immunity is to insure that the legislative function may be performed independently without fear of outside interference." The Court went on to recognize that in the absence of the immunity legislators may be distracted and forced to direct their time, energy and attention from their legislative tasks. *Id.* at 733.

The importance of this issue has been recognized consistently by this Court. These decisions establish, first, that legislative immunity prohibits a federal grand jury from obtaining by subpoena documents from Congress and, second, that a state legislature should be treated no differently.

Both *Gravel v. United States*, 408 U.S. 606 (1972), and *Eastland v. United States Servicemen's Fund*, 421 U.S. 491

(1975), mandate protection of Congress from forced disclosure by grand jury subpoena of documents obtained in a congressional investigation. *Gravel*, 408 U.S. at 615, 616, 627, instructs that requiring a senator to respond to grand jury interrogation about a legislative act must be proscribed. None of the justices in *Gravel* doubted that a grand jury subpoena constitutes questioning prohibited by the Speech or Debate Clause.[2]

Eastland, 421 U.S. at 504, recognizes that a legislative investigation is well within the legitimate legislative sphere:

> The power to investigate and to do so through compulsory process plainly falls within [the definition of the "legitimate legislative sphere"]. This Court has often noted that the power to investigate is inherent in the power to make laws because "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

Accordingly, *Gravel* and *Eastland* establish that a subpoena for legislative papers commanding information obtained by congressional investigators is impermissible.

This proscription against grand jury inquiry is premised on the Speech or Debate Clause of the United States Constitution.[3] The principles supporting the Speech or Debate Clause also support legislative immunity for state legislators. As this Court noted in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. at 732: "We have also recognized that state legislators enjoy common law immunity from liability for their legislative acts, an immunity that is similar in its origin and rationale to that accorded Congressmen under the Speech or Debate Clause."

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2. Rather, the justices disagreed as to whether the alleged activities of the senator should have been considered legislative acts immune from probing by a federal grand jury.

3. The Speech or Debate Clause of the United States Constitution, art. I, § 6, cl. 1, states: "for any Speech or Debate in either house, [the Members of Congress] shall not be questioned in any other place."

This and other courts have recognized that this similarity in origin and rationale mandates that legislative immunity should protect state legislators to the extent it protects members of Congress. This Court has consistently equated the legislative immunity to which state legislators are entitled to that accorded Congressmen under the Constitution, in actions premised upon 42 U.S.C. § 1983. *See Tenney v. Brandhove*, 341 U.S. at 367 (absolute immunity for state legislator from damages); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (absolute immunity for regional legislator from damages); *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. at 719 (absolute immunity for state judge acting in a legislative capacity from declaratory and injunctive relief). In so holding, the Court recognized that the need for independence of a state legislature is equally as important and deserving of respect as the need for Congressional independence:

> Indeed, we have recognized elsewhere that "a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland v. United States Servicemen's Fund, supra*, at 503. Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, *United States v. Gillock*, 445 U.S. 360 (1980), we generally have equated the legislative immunity to which state legislators are entitled under §1983 to that accorded Congressmen under the Constitution.

Id. at 733. These cases establish both reason and precedent for equating state and federal legislative immunity.

The Court of Appeals' refusal to recognize any immunity eviscerates this centuries-old doctrine of legislative independence and ignores the reasons supporting the immunity. The Court of Appeals' decision now sanctions federal interference with an ongoing state legislative investigation. By subjecting such a committee to federal grand jury subpoenas during an

ongoing investigation, the Court of Appeals' decision inevitably results in a deterioration of the quality of the investigation and requires state legislators to focus on matters other than their proper functions: oversight and legislation.

Any legislative response to a subpoena necessarily involves this interference, with the concomitant delay and disruption of the legislative function. Compliance with a subpoena requires expenditure of money and manpower, both usually in short supply, that otherwise would be directed to the legislative investigation. The distraction of compliance is exacerbated if the subpoena commands the presence of legislators themselves before the grand jury in the midst of their legislative investigation.

The delay and disruption in a legislative investigation that concerned this Court in *Eastland*, 421 U.S. at 491, are especially acute where a legislature must, as in the case, litigate the subpoena by moving to limit or quash. The interference with the ongoing investigation is well illustrated in the case at Bar, where litigation of the propriety of the subpoena has for two years required legislators and their staff to focus on court proceedings rather than the legislative investigation.

The adverse consequences of compliance with or litigation of a subpoena may also discourage legislatures from forming investigative committees, discourage legislators from serving on these committees, and even discourage persons from serving as legislators if they may be summoned to appear before the grand jury at the whim of a United States Attorney. Indeed, the Court of Appeals' decision is a deterrence to proper investigations vital to effective legislating.

Just as important as the distraction, disruption and delay caused by the subpoena is the danger of abuse of power or harassment of the state legislature by a United States Attorney. Although Petitioners do not contend that there were improper motives in this case, this Court should consider not only "what has been, but . . . what may be." *Weems v. United States*, 217 U.S. 349, 373 (1910). A politically motivated, overly ambitious

or overzealous prosecutor could, pursuant to the Court of Appeals' ruling, either intentionally or unintentionally disrupt the state legislative process by serving subpoenas demanding the appearance of legislators and their staff and files before a grand jury at any time. Such abuse of power is facilitated by the virtually unlimited investigative powers of grand juries and their relaxed standards of materiality and relevance. *See Gravel*, 408 U.S. at 631 (Stewart, J., dissenting in part).[4]

Another profoundly harmful impact of the Court of Appeals' decision is that it may prevent the investigative committee from obtaining the broadest possible range of information in its oversight function. As stated by Justice Stewart in his dissenting opinion in *Gravel*, 408 U.S. at 630, information otherwise available to a legislator may not be forthcoming if the confidential identity of the source of the information will be passed on to a federal grand jury.

The threat to the independence of the state legislatures described in *Tenney v. Brandhove*, 341 U.S. at 367, and *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. at 719, is the very real and dangerous result of the Court of Appeals' decision. These precedents, which were ignored by the Court of Appeals, establish the necessity for legislative immunity and its special value in our system of government.[5]

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4. Harassment from a state executive or its agencies or departments is also foreseeable under the Third Circuit's decision. For example, a state executive official may persuade a United States Attorney to serve subpoenas on the legislative committee investigating the state executive official, the effect of which would be harassment of or interference with the committee.

5. The District Court held that the information requested by the United States Attorney from the state legislature was readily available from other sources. To overrule the policy reasons supporting an immunity protecting state legislatures where there is no need to do so is the ultimate denial of the independence of the state legislature and defeat of the state legislature's integrity.

B. The decision of the Court of Appeals conflicts with decisions of the United States Courts of Appeals for the First and Second Circuits.

The decision below conflicts with decisions of the United States Courts of Appeals for the First and Second Circuits that persuasively delineate the reasons for equating state and federal legislative immunity.

In *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980), the court held that state and federal immunity from suit for injunctive relief and damages in a § 1983 action are congruent. Recognizing that the shared origins and justifications of the doctrines of common law immunity and the Speech or Debate Clause immunity "would render it inappropriate for us to differentiate the scope of the two without good reason," *id.* at 8, the court stated:

> Moreover, under our system of federalism, the role of the state legislature is entitled to as much judicial respect as that of Congress. Congress may legislate on matters of national concern, while state legislators act on vital matters of local importance. The need for a Congress which may act free of interference by the courts is neither more nor less than the need for unimpaired state legislatures. We show no more than "a proper respect for state functions," *Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971), in holding that state legislators must be accorded a privilege similar to that of federal legislators. "To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head." *Butz v. Economou*, 438 U.S. 478, 504, 98 S.Ct. 2894, 2909, 57 L.Ed.2d 895 (1978).

Id. at 9. The Court concluded that "*Tenney* . . . demonstrates that the immunity of state legislatures must be recognized by us." *Id.*

The Third Circuit's decision also conflicts with the decision of the United States Court of Appeals for the First Circuit in *In*

re Hampers, 651 F.2d 19 (1st Cir. 1981). In *Hampers*, the court held that the Massachusetts Commissioner of Revenue would not be required to comply with a federal grand jury subpoena by virtue of a state nondisclosure statute cognizable in federal court pursuant to Federal Rule of Evidence 501. The court rejected the government's argument that the deference owed to the grand jury mandated rejection of the privilege, stating:

> [H]onoring such a privilege in federal court will usually involve some cost to the federal interest in seeking the truth in federal question cases. It makes a difference whether the federal interest in seeking full disclosure is a weak or strong one. . . . Assisting federal grand juries in their criminal investigations is generally a strong interest. But where the information sought is only corroborative of what investigators have alleged on the basis of other information, is seemingly ascertainable from sources other than state tax returns, and addresses only one aspect of a non-tax-related crime, the federal interest looms less.

Id. at 22.

Referring to the "value in preserving . . . the postures of comity and deference arising from federalism", *id.* at 23, the court concluded:

> We therefore hold that appellant in this case enjoys a qualified privilege under Rule 501 because of the state nondisclosure statute and that, in order to enforce a subpoena in federal criminal investigation, a federal grand jury must proffer reasonable cause to believe that a federal crime has been committed, that the information sought will be probative of a matter at issue in the prosecution of that crime, and that the same information or equally probative information can not be obtained elsewhere through reasonable efforts.

Id. The *Hampers* court's recognition of a privilege in the grand jury context and the importance of comity and federalism conflicts with the Third Circuit's rejection of legislative immunity in the case at Bar.

The decision of the Court of Appeals below in carving out a draconian and unwarranted exception to the doctrine of legislative immunity conflicts, not only in principle but in effect, with these decisions of the First and Second Circuit Courts that proscribe such interference with the state legislative process. Lower federal courts and the litigants before them need further direction from this Court on this important question of legislative immunity.

C. The decision of the Court of Appeals misconceives *United States v. Gillock*, 445 U.S. 360 (1980), the implications of which are in need of clarification by this Court.

The Court of Appeals expressly and erroneously relied on this Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980), as foreclosing legislative immunity for state legislators:

> Our survey of the suggested rationales for the speech or debate privilege for members of Congress convinces us that after *Gillock* even a qualified speech or debate privilege for state legislators would not realistically serve the purposes that the Speech or Debate Clause is intended to advance. Neither the threat of harassment, the dangers of distraction, nor the potential disruption of confidential communications justifies a qualified privilege for the full range of legislative activities normally protected by the Speech or Debate Clause. We therefore refuse to recognize such a privilege; hence we reject the underlying rationale for the District Court's decision.

Appendix A at 21a. The Court of Appeals' reliance on *Gillock* misconceives the meaning and misapprehends the scope of *Gillock* and points to the urgent necessity for clarification of that case by this Court.

This Court in *Gillock* did not speak to the doctrine of legislative immunity urged by Petitioners in this case. Rather, the issue in *Gillock* was whether an evidentiary privilege cognizable under Rule 501 of the Federal Rules of Evidence or the federal common law should bar the introduction of evidence of the legislative acts of a state legislator charged with taking

bribes or otherwise obtaining money unlawfully through exploitation of his official position. *Id.* at 362. The prosecutors intended to use evidence of the legislator's criminal actions in a criminal trial of the legislator. Recognition of the evidentiary privilege urged by the legislator would have resulted in suppression of all evidence relating to the state legislator's corrupt legislative activities.

On the facts before it, this Court rejected Gillock's claim that a federal common law evidentiary privilege supported suppression of the evidence.[6] First, the Court stated that one rationale supporting the Speech or Debate Clause, "the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch," *id.* at 369, "resting solely on the separation of powers doctrine, gives no support to the grant of a privilege to state legislators in federal criminal prosecutions." *Id.* at 370. Next, the Court analyzed the second rationale underlying the Speech or Debate Clause: the need to insure legislative independence. The *Gillock* Court recognized this Court's sensitivity to such interference in *Tenney v. Brandhove*, 341 U.S. at 367, but stated that:

> [R]ecognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.

Gillock, 445 U.S. at 373.

The reach of *Gillock* does not extend to the situation at Bar. Even the Court of Appeals recognized the differences between this case and *Gillock*:

> We agree with the district court that *Gillock* did not by its terms foreclose all possible forms of privilege for state legislative activity. *Gillock* made clear the importance the

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6. Speaking to Gillock's contention that the Court should construct a Rule 501 evidentiary privilege, the Court foreclosed recognition of the privilege on that ground, holding that the "language and legislative history of Rule 501 give no aid to Gillock." *Id.* at 367.

> Supreme Court attached to the criminal context in which the case arose. Furthermore, the federal interest was obviously vital in that case because, in the Court's own terms, the privilege sought by Gillock threatened to immunize conduct proscribed by Congress. In contrast, the interest in enforcing the subpoena in this case is less crucial.

Appendix A at 15a. In *Gillock*, recognition of an evidentiary privilege would have completely immunized the state legislator from criminal liability, and the Court recognized the importance of the criminal context in which the question was presented. The situation presented here, however, does not arise in this criminal context.[7] The federal interest in the case at Bar is much less crucial, and the impact on the legislature is much more disastrous than that resulting from rejection of the evidentiary privilege sought by Gillock.

The intrusive impact on a state legislature of a subpoena directed to a legislative committee during an ongoing legislative investigation, as in this case, dwarfs any adverse consequences from the introduction into evidence of corrupt public acts by an indicted legislator, as was the case in *Gillock*. There, introduction into evidence of the public criminal acts of the indicted state legislator had little, if any, impact on the legislative institution, since most were public acts that were documented in the public record. In the present situation, the entire legislative body is disrupted; for example, confidential relationships and communications are exposed and state legislative records are removed from the legislature during public hearings.

The Court of Appeals misapplied the analysis and misapprehended the scope of *Gillock* in relying on the case to reject the legislative immunity urged by Petitioners. In light of this Court's long-standing recognition of the importance of legislative immunity to both state and federal legislators, *Gillock*

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7. *Shillitani v. United States*, 384 U.S. 364, 368-71 (1966), establishes that proceedings involving failure to comply with a grand jury subpoena are civil rather than criminal. *See also* 28 U.S.C. § 1826; *In re Grand Jury Investigation*, 600 F.2d 420 (3d Cir. 1979).

should not be read so broadly as to mandate rejection of the immunity here. This case demonstrates the need to clarify *Gillock* so that it may not be used by the lower federal courts to eviscerate this immunity and its special value in our system of government.[8]

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8. The need to clarify the scope of *Gillock* is exemplified by the decision of the United States Court of Appeals for the First Circuit in *Hampers*, 651 F.2d at 19. The *Hampers* court's analysis of *Gillock* is diametric to that of the Third Circuit in this case and establishes the need for clarification of *Gillock* by this Court:

> The United States stresses particularly the Supreme Court's refusal in *United States v. Gillock*, 445 U.S. 360, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980), to recognize a privilege for state legislators paralleling that of United States Senators and Congressmen. *Gillock*, however, is distinguishable in at least two significant respects: first, the state provision at issue was in terms a limit only on the prosecution powers of the state; second, the federal interest there included a federal criminal statute whose very purpose might have been frustrated by recognition of the privilege asserted. *Id.* at 374, 100 S.Ct. at 1193, 1194.

Hampers, 651 F.2d at 22 n. 3.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2, 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5144

IN RE: GRAND JURY

IN THE MATTER OF:
GRANITE PURCHASES FOR
STATE CAPITAL - GRAND
JURY SUBPOENA NUMBER 86-1

United States of America,

Appellant

On Appeal from the United States
District Court for the
Middle District of Pennsylvania
(D.C. Misc. No. 86-027)

Argued August 19, 1986

Submitted Following Remand
Pursuant to Third Circuit Rule 12(6)
March 5, 1987

Before: BECKER and MANSMANN,
Circuit Judges and
TEITELBAUM, *District Judge**

(Filed June 9, 1987)

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* The Honorable Hubert I. Teitelbaum, United States District Judge for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

BECKER, *Circuit Judge*.

The Chairman of an investigative committee of the Pennsylvania House of Representatives and other leaders of the House ("the Legislators") have refused to comply with a federal grand jury subpoena seeking certain records of the committee's investigation into alleged contractual fraud.[1] They assert a common law speech or debate privilege for state legislators cognizable in federal courts under Federal Rule of Evidence 501. On the basis of this asserted privilege, they petitioned the district court to quash the subpoena. Applying a balancing test to the competing interests, the district court granted much of

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1. The subpoena principally seeks notes, summaries and transcripts of witness interviews.

the requested relief. The United States, acting for the grand jury, now appeals.

In *United States v. Gillock*, 445 U.S. 360 (1980), the Supreme Court rejected a claim that a speech or debate privilege prevents a prosecutor from using evidence of a state legislator's legislative acts in a prosecution against him. The Legislators and the district court believe that *Gillock* is distinguishable because it involved a more compelling federal interest than that at stake in this case; essentially they claim that *Gillock* rejected only an absolute privilege and does not preclude a qualified speech or debate privilege that protects the documents requested here.

Gillock, however, was not based on a general balancing of competing interests that may differ from case to case. Instead, the Supreme Court engaged in a particularized analysis of whether the interests protected by the Constitution's Speech or Debate Clause justify extension of that protection to state legislators. An analysis along the lines suggested by *Gillock* leads also to rejection of a qualified privilege. Neither the threat of harassment by the federal executive or judiciary, nor the dangers of distraction, nor the potential disruption of confidential communications justifies a qualified privilege for the full range of legislative activities normally protected by the Speech or Debate Clause.

Although we do not foreclose the possibility of a qualified privilege limited only to confidential deliberative communications, that issue is not squarely before us on the present record. The district court erred in concluding that the records at issue were insulated from production by a qualified privilege. Its order limiting the subpoena will therefore be reversed.

I. *FACTS AND PROCEDURAL HISTORY*

In early 1985, a select committee of the Commonwealth of Pennsylvania's House of Representatives (the "Committee") began an investigation into alleged improprieties, including payoffs, in the procurement of granite for an expansion of the state capitol in Harrisburg. The Committee reviewed numerous

documents. It also interrogated witnesses in both open and closed session and through its investigators, in the process generating transcripts, summaries, notes and memoranda of its interviews.

In January, 1986, at the suggestion of the Pennsylvania Department of General Services, the United States Attorney for the Middle District of Pennsylvania convened a grand jury to investigate the same occurrences. Shortly thereafter, agents of the FBI met with Representative Nicholas Colafella, Chairman of the Committee, and with Committee counsel Reizdan Moore. These men advised the agents generally of the progress of the investigation but confined themselves essentially to matters of public record. Although Moore stated in an affidavit submitted to the district court that he had disclosed his impressions about potential sources of evidence and the Committee's intentions regarding certain witnesses, Colafella and Moore denied the agents access to documents, transcripts and notes not yet made public. Colafella and Moore also refused to reveal the names of many witnesses, the substance of what they said or whether they may have committed any federal crimes.

On January 15, 1986, following this interview, the U.S. Attorney caused a grand jury subpoena duces tecum to be directed to Representative Colafella or the records custodian of the Committee, demanding production of the following documents:

> All records in your care, custody and control relating to an investigation of the purchase of granite use [sic] in the Capitol addition project as follows:
>
> 1. Memos, reports, summaries, interview notes, record review notes, correspondence and any other documents of an investigative nature compiled, adopted, prepared or sent and received by any committee investigator including, but not limited to, the listed individuals and companies named on the attached list [omitted].

> 2. Agenda, minutes, summaries and all transcripts of public and private hearings, along with copies of all documents or exhibits referred to in said transcripts summaries, agenda or minutes during testimony or in comments by committee members or staff.

The subpoena also stated that in lieu of personal appearance, the documents could be mailed to the U.S. Attorney's office.

Colafella responded by moving to quash the subpoena, asserting that he need not produce the records because of a federal common law speech or debate privilege for state legislators under Federal Rule of Evidence 501. With the consent of the United States Attorney, several legislators were permitted to intervene in alignment with Colafella, including the Speaker of the Pennsylvania House of Representatives, the majority and minority leaders and the Bipartisan Committee for the Administration of the House. The district court held an immediate hearing, and the parties stipulated to many facts including the fact that no legislator was then a subject or target of the investigation.

Much of the hearing focused on the nature of the documents sought by the subpoena and whether they would reveal the thought processes of legislators or their aides. The U.S. Attorney repeatedly stated that he sought only "hard" evidence:

> . . . I am basically asking for . . . investigative reports of interviews conducted with yet other individuals and the sworn testimony of other individuals whether taken publicly or in executive session. I want no attorney-client privilege nor do I ask that the grand jury be tainted by documents that are privileged in any other manner including legislative thought processes or work processes.

The Legislators informed the court that the Committee had already made many of the transcripts and documents public, but the U.S. Attorney rejoined: "It is my belief that there are additional documents and interviews which have not been made public which are vital and relevant. If it could be represented

that there are not, I would withdraw my subpoena and abide the event."

The Legislators responded that the documents sought would in fact reveal the thought processes of committee members and their aides. The Legislators argued that the revelation of thought processes significantly impinged on legislative independence and the values of federalism. Moreover, the Legislators claimed that the supoena did not further significant federal interests in law enforcement because: (1) most of the subpoenaed information was obtainable by the Grand Jury from other sources, and (2) the fact that no legislator was under investigation indicated that the Grand Jury sought to use the Committee merely as its investigative tool.

Following oral argument and full briefing, the district court agreed substantially with the Legislators. The court adopted a general balancing approach to the privilege question and essentially accepted the Legislators' evaluation of the competing interests. The court therefore quashed the subpoena in most particulars. The Legislators remained obligated only to disclose the identity of committee witnesses and to produce documents which the Committee had not itself authored if the Grand Jury could demonstrate that they were unobtainable through other means.

The district court entered its order on January 31, 1986. On February 6, the Committee released numerous documents to the public and sent copies of these documents directly to the U.S. Attorney. The U.S. Attorney did not believe that these documents included all those within the reach of the subpoena and therefore appealed to this court. When the Legislators filed their brief, however, they appended an affidavit by Committee Counsel Moore which stated that "all relevant or remotely relevant information regarding payoffs which was obtained on or before February 6, 1986, has been released to the public and turned over to the United States Government . . . ."

The case was listed for oral argument. In view of the Moore affidavit, the panel was concerned whether a viable case or controversy existed and inquired whether any documents sought by the subpoena remained unproduced. The ensuing

colloquy did not resolve the question. At the conclusion of oral argument, the panel suggested to counsel that they attempt to resolve their differences and report to the Court in writing. However, the parties remained unable to settle their dispute or even to agree whether documents subject to the subpoena remained unproduced. Uncertain whether the case was or was not moot, the panel retained jurisdiction but remanded the matter to the district court for a determination of mootness.

The district court received supplemental submissions and determined that "a case or controversy still exists." The court found that the Committee had not released several specific items "which fall within the scope of the subpoena:"

> 1) memorandums, summaries of interviews, interview notes, reports of interviews with Carl Lunderstadt, John Scott, Robert Billingsly, Mr. Bernardo.
>
> 2) memorandums, summaries, notes, reports of interviews of potential witnesses interviewed by the committee's investigator, Stanley Gochenour and the commiitee's attorney, Reizdan Moore.

The district court also found that the Legislators did not have to produce these items under the terms of its previous order quashing most of the subpoena's request.

The case has now returned to us from the district court, and we have received supplemental submissions. Despite the district court's findings, the Legislators continue to press a claim of mootness. They argue first that the U.S. Attorney effectively modified the subpoena by stating to the district court that he would withdraw the subpoena if the Legislators represented that all vital and relevant documents and interviews had been made public. The Legislators contend that they have complied with this modified subpoena through Moore's representation that "all relevant or remotely relevant information" has been turned over to the government. The Legislators additionally claim mootness because the Committee ceased functioning on November 26, 1986 when the legislature expired to be replaced by a newly

elected legislature. As of that day, the Legislators claim, Representative Colafella no longer had authority to produce the documents requested by the subpoena.

In addition to these mootness claims, the parties have reasserted their previous arguments on the merits.

II. *MOOTNESS*

The Legislators' suggestion that they have complied with the subpoena by providing the statement requested by the U.S. Attorney amounts to a kind of compliance by estoppel argument. Even assuming the viability of such a theory, however, one requirement of any estoppel claim is a showing of detrimental reliance. The Legislators have not explained how they relied on the U.S. Attorney's statements to their detriment.

Futhermore, the U.S. Attorney stated that he would be satisfied only if the Legislators represented that no relevant "documents or interviews" remained unavailable. Moore's affidavit referred only to "relevant information." The district court has specifically found that the Legislators have not turned over many relevant documents. This finding indicates at the least that Moore's view of "relevant information" does not conform to the U.S. Attorney's understanding of all relevant "documents." It further indicates that documents sought by the subpoena remain unproduced. Because the Legislators do not challenge that finding as unsupported, we must agree with the district court that the Legislators have not complied with the subpoena; hence the case is not moot on the ground of compliance.

The Legislators' second claim of mootness, lack of possession or legal control, is equally without merit. A party's lack of possession or legal control over documents requested by a subpoena is normally a valid defense to a subpoena and justification for a motion to quash. But such a defense presents a question on the merits not one of mootness. *See In the Matter of Grand Jury Impaneled January 21, 1975 (Freedman & Cortese)*, 541 F.2d 373, 377 (3d Cir. 1976) (treating claim of lack of legal authority to produce records as question of the merits). Moreover, it may involve a number of factual disputes, and to succeed on such a defense, Representative Colafella has the burden of

producing at least some evidence that he does not have possession or control of the documents sought. *See McPhaul v. United States*, 364 U.S. 372, 378-79 (1960) (party claiming lack of control as defense to congressional subpoena duces tecum must testify that he does not possess or control records); *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313, 318 (2d Cir. 1979) ("[W]hen the agent fails to produce documents that are the subject of a valid summons or subpoena, if called before a court, he must give sworn testimony that he does not possess them."). The Legislators have offered no evidence whatsoever, and we will not postpone our consideration of the district court's order because of unsubstantiated allegations that might support a separate, independent, ground for quashing the subpoena.[2] We therefore turn to the merits.[3]

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2. The Legislators' "lack of possession" defense also raises several difficult legal issues including: the effect of the change in status during the pendency of the litigation; the effect of the subpoena's direction not only at Colafella but also at the "Records Custodian;" the effect of the subpoena's direction not only at Colafella but also at the "Records Custodian;" the effect of the intervention of the Bi-Partisan Committee for the Management of the House, which appears to have statutory authority over all house records, *see* 46 Penn Stat. Ann. §42.121b(a)(11) (Purdon's Supp. 1986); and the applicability of Federal Rule of Civil Procedure 25(d)(1), which permits automatic substitution of one government officer with his successor. All of these issues, which provide possible responses to the lack of possession defense, may properly be raised in the district court if the Legislators choose to pursue their claim that the subpoena is unenforceable because Colafella no longer has control over the documents.

3. Prior to oral argument, we directed the parties to address the standing of the intervenors to press a legislative privilege claim inasmuch as the documents requested did not reflect the intervenor's own legislative communications or activities. We did so because of precedent suggesting that "the purpose of the Speech or Debate Clause is to protect the individual legislator, [although] not simply for his own sake, but to preserve the integrity of the legislative process." *United States v. Brewster*, 408 U.S. 501, 524 (1972). Whether the intervenors have standing, however, depends on the scope of the privilege, and we cannot determine the scope of a hypothetical privilege if it does not exist. Because we must determine whether the privilege exists before determining its scope, we necessarily assume the standing of all appellees to claim the privilege and proceed to a discussion of the merits.

III. *THE MERITS*

A. *Introduction*

A grand jury exercises broad investigative powers and generally has both the right and the duty to procure every man's evidence. *United States v. Dionisio*, 410 U.S. 1, 9-10 (1973). This power is limited only by constitutional, common law or statutory privilege, or by the exercise of the district court's supervisory authority to "quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c); *see Branzburg v. Hayes*, 408 U.S. 665, 668 (1972). While appellate courts will normally defer to the district court's exercise of its supervisory authority, *see In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963, 967 (3d Cir. 1975), *cert. denied*, 421 U.S. 1015 (1975); *In re Grand Jury Matters (Young)*, 751 F.2d 13, 16 & n.3 (1st Cir. 1984), "[j]udges may not, in the guise of exercising supervisory power, create new privileges or enlarge or distort existing ones," *Young*, 751 F.2d at 18. The existence and scope of a privilege are questions of law which Congress has directed courts to consider "in the light of reason and experience." Fed. R. Evid. 501.

Because the district court relied on a theory of a common law speech or debate privilege for state legislators, we must reverse its order if the district court's understanding of the privilege was in error. To analyze that question, we must first discuss the contours of the speech or debate privilege for members of Congress, for the Legislators' contend that the same or similar interests motivating that privilege justify a comparable, albeit qualified, privilege for state legislators. We then analyze the Supreme Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980), and the district court's reasons for distinguishing it. Finally, we apply the lessons of *Gillock* to decide whether we should recognize the qualified privilege claimed in this case.

B. *The Federal Congressional Privilege and Gillock*

The speech or debate privilege for members of the United States Congress has its source in the Speech or Debate Clause of

the Constitution, Art. I., §6, cl. 1. Its " 'central role'. . . is to 'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.' " *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975) (*citing Gravel v. United States*, 408 U.S. 606, 617 (1972)). It also prevents disruption of Congressional operations by preventing distractions or interference with ongoing activity. *See id.* at 510 n.16 ("Where we are presented with an attempt to interfere with an ongoing activity by Congress . . .[t]he speech or debate protection provides an absolute immunity from judicial interference.") The Speech or Debate Clause accomplishes these goals primarily by providing Congressmen and their aides with absolute immunity from criminal or civil suit, *see Gravel*, 408 U.S. at 615-16 (criminal); *Eastland*, 421 U.S. at 503 (civil), for "acts that occur in the regular course of the legislative process," *United States v. Brewster*, 408 U.S. 501, 525 (1972).

In order to insure that Congressmen are not held liable for legislative acts, the Speech or Debate Clause mandates an evidentiary privilege that prohibits evidence of a Congressman's acts from being used in a proceeding against him. *See United States v. Helstoski*, 442 U.S. 477, 488-89 (1979). Because "hostile questioning by the executive branch before a possibly hostile judiciary," may also impinge on legislative independence, *In re Grand Jury Investigation ("Eilberg")*, 587 F.2d 589, 597 (3d Cir. 1978), the speech or debate privilege is also testimonial and protects a Congressman or his aides from judicial questioning about his legislative acts, *Gravel*, 408 U.S. at 415-16; *Eilberg*, 587 F.2d at 596.

Both prongs of this evidentiary privilege have two crucial features. First, in keeping with the broad scope of Congressional immunity, the evidentiary privilege applies broadly to evidence or testimony about all "acts that occur in the regular course of the legislative process." *Brewster*, 408 U.S. at 525. It therefore applies to activity taken in the course of legislative factfinding. *Eastland*, 421 U.S. at 504-05 (1975); *see also Government of the*

Virgin Islands v. Lee, 775 F.2d 514, 521 (3d Cir. 1985).[4] Second, the speech or debate privilege is "absolute;" hence, it cannot be overcome by any countervailing interest no matter how strong. *Eastland*, 421 U.S. at 510 n.18.

For many years, courts of appeals differed over the recognition of a speech or debate privilege for state legislators. Some courts held that because the evidentiary privilege for Congressmen exists primarily to protect Congressional immunity, a comparable evidentiary privilege for state legislators, who lack this immunity, made little sense. *See e.g., United States v. Craig*, 537 F.2d 957 (7th Cir.) (en banc), *cert. denied*, 429 U.S. 973 (1976); *United States v. DiCarlo*, 565 F.2d 802, 807 (1st Cir. 1977), *cert. denied*, 435 U.S. 924 (1978). In contrast, a panel of this court recognized the privilege because of the historically accepted view that "a legislature will function better in the public interest with the protection than without it." *In re Grand Jury Proceedings (Cianfrani)*, 563 F.2d 577, 583 (3d Cir. 1977). This conflict between the circuits was resolved by the Supreme Court in *United States v. Gillock*, 445 U.S. 360 (1980).

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4. Although the speech or debate privilege applies to legislative factfinding, it is by no means clear that the privilege would bar this subpoena even were it directed at members of Congress. Our precedents have suggested that the privilege is primarily one of non-evidentiary use, not one of non-disclosure. *See Lee*, 775 F.2d at 523; *Eilberg*, 587 F.2d at 595-96 (suggesting that documents memorializing legislative activities may be usable against third parties); see discussion *infra* of confidentiality concerns at typescript 27-29. Furthermore, at least one court originally upheld a subpoena for records compiled by a joint investigation of an agency and a Congressional committee after that investigation had ended despite a Speech or Debate Clause challenge. *Paisley v. C.I.A.*, 712 F.2d 686, 696-97 (D.C. Cir. 1983). That portion of the opinion was later vacated because the court found that it did not have to reach that matter 724 F.2d 201, 204 (D.C. Cir. 1984).

An analysis of the privilege for members of Congress, however, inevitably involves constitutional concerns. In contrast, an analysis of the privilege for state legislators involves only the federal common law of evidence. To avoid resolving constitutional questions unnecessarily, we restrict our attention only to the privilege claim of state legislators.

In *Gillock*, the Supreme Court considered whether a common law speech or debate privilege barred federal prosecutors from introducing evidence of a Tennessee state representative's support for particular legislation in a prosecution against the representative for bribery.[5] Chief Justice Burger's decision for the court separated the purposes of the speech or debate privilege into "[t]wo interrelated rationales . . . : first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence." 445 U.S. at 369.

The interest in preventing intrusion, the Court held, provides no support for a privilege for state legislators in federal cases because the Federal Government has supremacy over state legislatures in areas where the Constitution grants it power to act. Although the Court noted that interests of comity and federalism "command careful consideration," 445 U.S. at 373, it held that "federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch," 445 U.S. at 370 (citations ommitted), and could not justify the privilege requested in that case.

Turning to the second rationale, the interests in legislative independence, the Court recognized that "denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function" and that interests of comity commanded some concern for this impact. 445 U.S. at 373. But the court noted that it had traditionally drawn the line at protection of state legislators in civil suits. The courts have no power, it reasoned, through the creation of an evidentiary privilege "to immunize criminal conduct proscribed by an Act of Congress." 445 U.S. at 372 (emphasis omitted)(*citing Gravel*,

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5. *In United States v. Brewster*, 408 U.S. 501 (1972), the Supreme Court held that the Speech or Debate Clause did not protect a member of Congress from prosecution for accepting a bribe in return for a promise of a legislative act. That case, however, did not permit evidence of the actual legislative act to be used against the Congressman. Thus, if Gillock had been a member of Congress, evidence of the legislative activity would have been inadmissible against him. *Gillock*, 445 U.S. at 367.

408 U.S. at 627). Accordingly, the Court held that no common law speech or debate privilege bars federal authorities from using evidence of legislative acts in prosecutions against state representatives.

C. *The Reasoning of the District Court*

The district court distinguished *Gillock* on the grounds that the need to use evidence of legislative acts against the Tennessee representative provided a more compelling federal interest than the need in this case to obtain evidence from a state legislator that is independently obtainable. In doing so, the district court essentially read *Gillock* as denying state legislators only an absolute speech or debate privilege. In the implicit reasoning of the district court, *Gillock* did not preclude a qualified speech or debate privilege for state legislators, i.e., a privilege applicable to the full range of legislative activities normally protected by the Speech or Debate Clause for members of Congress but, when claimed by state legislators, surmountable by a federal prosecutor's particularized showing of need.

Having distinguished *Gillock* to its satisfaction, the district court proceeded to balance the competing interests of federal law enforcement and state legislative independence in this particular case to decide whether it should uphold the privilege claim. On the federal side, the court noted that the grand jury could obtain virtually all the information it sought from an independent investigation and that no state legislator was a target of the investigation. On the side favoring the privilege, the district court placed "the integrity of the legislative process." Balancing these interests, the court held "that the policy underlying the asserted privilege outweighs that favoring disclosure" and thus justifies the protection requested by the Legislators. Only if the Grand Jury could demonstrate a particularized need for a specific document by showing that it could not obtain the document through another source would the district court be prepared to command compliance with the subpoena.

We agree with the district court that *Gillock* did not by its terms foreclose all possible forms of privilege for state legislative activity. *Gillock* made clear the importance the Supreme Court attached to the criminal context in which the case arose. Furthermore, the federal interest was obviously vital in that case because, in the Court's own terms, the privilege sought by Gillock threatened to immunize conduct proscribed by Congress. In contrast, the interest in enforcing the subpoena in this case is less crucial. The subpoena will assure the Grand Jury all the hard evidence obtained by the Committee, and the statements obtained by the Committee when the trail was fresh may provide insights not available later on or may provide important corroboration. Recognition of the privilege, however, is unlikely to thwart the investigation entirely. In light of this difference, the district court was correct not merely to cite *Gillock* and to forego all further analysis but instead to evaluate the request for a qualified privilege with the additional use of its "reason and experience." Fed. R. Civ. P. 501, *see* typescript *supra* at 14.

Notwithstanding differences between this case and *Gillock*, we disagree with the district court's method of analysis in three important respects. First, the district court analyzed the Legislators' privilege request entirely in the context of this case. Such a narrow focus was in error because a court must first decide whether a qualified privilege exists or should exist before deciding how to apply it to a particular case.

By insisting on a two-step process, courts guide their discretion with rules developed from accumulated wisdom about the situations that justify a privilege. The requirement of general privilege rules also enables private actors to rely on those rules and thereby to engage more freely in the conduct privileges aim to encourage. Thus, although the concept of the qualified privilege permits courts to uphold or reject privilege claims in light of the particulars of an individual case, the decision to recognize a qualified privilege must still follow from a more broad-based view of how the privilege will work in general.

Second, although all privilege analysis involves some balancing, we disagree with the abstract nature of the district court's balancing approach. Common law privileges should be

"accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally prudent principle of utilizing all rational means for ascertaining truth.' " *United States v. Trammell*, 445 U.S. 40, 50 (1980) (citations omitted). The justification for a privilege must be specific, for courts should apply privileges "only to the extent necessary to achieve their purpose." *Freedman & Cortese*, 541 F.2d at 382 (*citing Fisher v. United States*, 425 U.S. 391, 403 (1976)).

In *Trammell*, for example, the Supreme Court rejected the historically accepted privilege that permitted one spouse to exclude the testimony of the other despite the claim that it fostered "the harmony and sanctity of the marriage relationship." *Trammell*, 445 U.S. at 44.[6] The court found that the asserted benefit rested on a generalization and not on the required, sound, practical explanation of how the privilege would protect the relationship, *id.* at 51-53. Similarly here, the district court should not have terminated its analysis with the assertion of the need for "legislative independence" but should have examined more specifically how a common law speech or debate privilege would realistically assist legislators to perform their function.

Finally, we do not believe the district court's efforts merely to distinguish *Gillock* paid proper respect to its significance. Gillock's reasoning undercuts the weight we may accord interests of comity and federalism, and *Gillock's* practical impact undermines the extent to which recognition of a speech or debate privilege for state legislators may realistically further the interests that the privilege has traditionally safeguarded. To analyze the Legislators' claim, we must evaluate the specific reasons for and against a qualified speech or debate privilege in light of the theoretical and practical limitations imposed by *Gillock*.

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6. This privilege was distinct from the privilege, left intact by *Trammell*, which permits one spouse to refuse to testify against the other spouse.

D. *Analysis of Qualified Speech or Debate Claim in Light of* Gillock

As we have discussed, the core rationale for the speech or debate privilege has traditionally been the protection of legislative independence through a "prophylactic" rule assuring members of Congress that their legislative activities cannot lead to harassment by the executive or the judiciary. *United States v. Johnson*, 383 U.S. 169, 182 (1966); *see also Eastland*, 421 U.S. at 502. The need to prevent this harassment has overridden the danger of legislative misconduct inadvertently protected by the privilege. *See Brewster*, 408 U.S. at 516. *Gillock* made clear, however, that the concern with potential harassment rests on an underlying concern for maintenance of the separation of powers. 445 U.S. at 370. Federalism and comity do not raise the same concerns because the Supremacy Clause sanctions "interference" with state legislatures by the federal executive and judiciary so long as they pursue legitimate federal aims. Accordingly, *Gillock's* reasoning suggests that prevention of intimidation is simply not a legitimate rationale for extension of the privilege to state legislators.

As a practical matter, *Gillock's* holding also makes the prevention of intimidation and harassment impossible. The greatest potential for intimidation, of course, lies in the power of the federal government actually to prosecute legislators for their actions. The prophylactic function of the privilege is therefore undermined once federal officials may prosecute legislators for their legislative acts and obtain and use evidence of legislative acts for that purpose. Although the federal government may have less interest in intruding on state legislative functions when no misconduct is alleged, a qualified privilege that gives way when misconduct is alleged cannot insulate state legislators from intimidation. A qualified privilege therefore cannot serve a purpose for state legislators similar to that which lies at the core of the privilege for members of Congress.[7]

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7. The Supreme Court has engaged in a similarly practical analysis of the potential for harassment in rejecting the contention that the speech or debate

(*Footnote Continued*)

In addition to this core rationale, *Gillock* also recognized that legislative independence may in some senses be unrelated to the threat of intimidation. Even apart from the potential impact federal intimidation may have on a legislator's activity, a subpoena may burden a state legislator with onerous production requirements or may force a state legislator to disclose confidential communications. Having found that the core rationale is inapplicable here, we must still examine whether these threats to the functioning of the legislature justify creation of a qualified privilege that may apply to cases in which the federal interest is less compelling than it was in *Gillock*.

We certainly agree that a subpoena directed at the records of an ongoing legislative investigation could be unduly burdensome and may intrude on important legislative interests. We take this problem seriously because the citizenry not only has a strong interest in the success of federal criminal prosecutions to punish and to deter misconduct, but also a strong interest in the success of state legislative investigations that may lead to changes preventing future misconduct. Furthermore, the burden on legislators is a speech or debate concern. The Supreme Court has held analogously that the Speech or Debate Clause shields Congressmen from suit to block a Congressional subpoena because making the legislators defendants "creates a distraction and forces Members [of Congress] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland*, 421 U.S. at 503.

We do not believe, however, that a state legislator's interest in avoiding the burdens of compliance with a subpoena is alone sufficient to justify creation of a speech or debate privilege.

(Footnote Continued)
privilege barred prosecution of a member of Congress for accepting a bribe in return for the promise of a legislative act:

> But if the Executive may prosecute a Member's attempt, as in *Johnson*, to influence another branch of the Government in return for a bribe, its power to harass is not greatly enhanced if it can prosecute for a promise relating to a legislative act in return for a bribe.

Brewster, 408 U.S. at 524.

Gillock instructs us that any such privilege must be qualified, not absolute, and must therefore depend on a balancing of the legitimate interests on both sides. Yet Rule 17 of the Federal Rules of Criminal Procedure already authorizes a district court to quash or modify a subpoena that is unreasonable or oppressive. That rule permits the district court to protect state legislators from undue disruption of their activities while still accommodating the need for information by the party issuing the subpoena. Interests of comity and federalism require that a district court respect the needs of state legislators, but Rule 17 continues to be the proper vehicle for accommodating the competing interests.

The state legislator's need for confidentiality is more troublesome. As a panel of the District of Columbia Circuit has noted, the legislator's need for confidentiality is similar to the need for confidentiality in communications between judges, between executive officials, and between a President and his aides. *See Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973). The need for a full, frank exchange of ideas has led courts to recognize qualified privileges for each of these governmental decisionmakers. *See, e.g., United States v. Nixon*, 418 U.S. 683, 708 (1974) (recognizing privilege for Presidential communications because "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately"); *United States v. Weber Aircraft*, 465 U.S. 792, 802 (1984) (recognizing privilege for executive officials because history of governmental privileges "recognizes a need for claims of privilege when confidentiality is necessary to ensure frank and open discussion and hence efficient governmental operations") (citations omitted); *In Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit ("Hastings")*, 783 F.2d 1488, 1519 (11th Cir.), *cert. denied*, 106 S. Ct. 3273 (1986) (recognizing judicial privilege because "[j]udges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties.").

Even while granting governmental officials a qualified, confidentiality privilege, however, the courts have taken pains to insure that the privilege applies only "to the very limited extent" that the "public good" in confidentiality transcends the value of "utilizing all rational means for ascertaining truth." *Trammell*, 445 U.S. at 50 (quotation omitted). *In Nixon*, for example, the enormous importance and sensitivity of the President's personal communications motivated the Supreme Court to hold that these communications are "presumptively privileged," requiring the prosecutor to make a threshold showing of need and permitting the prosecutor access only to relevant, admissible evidence. *Nixon*, 418 U.S. at 713-16. However, the Court held that the President's "generalized interest in confidentiality," *id.* at 713, could not prevail over the need for "evidence that is demonstrably relevant in a criminal trial," *id.* at 712.

When dealing with lesser governmental officials, courts have treated claims of privilege even more strictly. They have required a threshold showing that communications of executive or judicial officials involve confidential deliberations about the decisions entrusted to them before those communications become presumptively privileged. *See, e.g., Hastings*, 783 F.2d at 1520-22 (11th Cir. 1986) (judicial privilege applies only upon showing that matters under inquiry implicate communications among a judge and his staff concerning performance of judicial business "such as . . . the framing and researching of opinions, orders and rulings"); *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-54 (1975) (executive privilege for agency officials applies only to documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated") (*quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966).

These precedents reflect the judicial reasoning and experience required by Rule of Evidence 501. In accordance therewith, we do not believe that the needs of state legislators for confidentiality justify the creation of a qualified privilege for the full range of legislative activities normally protected by the

Speech or Debate Clause. Not all acts "that occur in the regular course of the legislative process," *Brewster*, 408 U.S. at 525; will involve confidential communications, and many communications actually made in confidence have only limited need for confidentiality. For this reason, our prior decisions have recognized that confidentiality does not lie at the root of the concerns motivating a privilege for all legislative speech or debate. The spech or debate privilege is at its core a "use privilege" not a privilege of nondisclosure. *See Government of Virgin Islands v. Lee*, 775 F.2d 514, 523 (3d Cir. 1985); *In re Grand Jury (Eilberg)*, 587 F.2d 589, 595-96 (3d Cir. 1978).

Our survey of the suggested rationales for the speech or debate privilege for members of Congress convinces us that after *Gillock* even a qualified speech or debate privilege for state legislators would not realistically serve the purposes that the Speech or Debate Clause is intended to advance. Neither the threat of harassment, the dangers of distraction, nor the potential disruption of confidential communications justifies a qualified privilege for the full range of legislative activities normally protected by the Speech or Debate Clause. We therefore refuse to recognize such a privilege; hence we reject the underlying rationale for the district court's decision.

V. *Proceedings on Remand*

Although we reject a qualified speech or debate privilege, our discussion does not preclude the possibility of a more narrowly tailored privilege for confidential deliberative communications. Notwithstanding their advocacy of a broad speech or debate privilege, the Legislators have relied in oral argument on confidentiality concerns. The district court apparently assumed that state legislative documents are privileged merely because they may somehow reveal the "thought processes" of state legislators. Although we are reluctant to go so far as to recognize a confidentiality privilege and to delineate its contours, we believe we must analyze the district court's assumption to provide guidance for remand. We note in this regard that this case has already been before us twice and that the Grand Jury's investigation has been delayed by more than a year.

To analyze the Legislators' confidentiality concerns, we look for guidance to the "deliberative process privilege" for executive officials. Of all confidentiality privileges for government officials, that privilege has probably received the most intricate explication by the courts. *See generally* M. Larkin, Federal Testimonial Privileges §5.02[2] & 5.07, at 5-13 to 5-30, 5-87 to 5-90 (1986); Project, *Developments in the Law Privileged Communications*, 98 Harv. L. Rev. 1450, 1592, 1620-23 (1985). We also believe that it provides a useful analogy for a confidentiality-based privilege for state legislators because executive agencies, like state legislators, engage in a wide variety of activities, including factual investigations for quasi-legislative rulemaking.[8]

The "deliberative process privilege" applies only to confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice. *See NLRB v. Sears Roebuck & Co.*, 421 U.S. at 150-54; *EPA v. Mink*, 410 U.S. 73, 89 & n. 16 (1973). "[I]n most situations, factual summaries prepared for informational purposes" will not be protected even if they are part of an investigative record. *Paisley v. C.I.A.*, 712 F.2d 686, 699 (D.C. Cir. 1983) (citing cases). Even if documents contain advisory opinions, factual material which is severable is not protected. *See Mink*, 410 U.S. at 88-91. Furthermore, the party seeking disclosure may overcome the claim of privilege by showing a sufficient need for the material in the context of the facts or the nature of the case, *see Sears Roebuck & Co.*, 421 U.S. at 149 n. 16; *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); or by making a prima facie showing of misconduct, *see KPC Nat'l Management Corp. v. NLRB*, 497 F.2d 298, 305 (D.C. Cir. 1984), *cert. denied*, 423 U.S. 1087 (1976); *Singer Sewing Machine Co. v. NLRB*, 329 F.2d 200, 208 (4th Cir. 1964).

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8. In addition, subpoenas directed at executive agencies arouse less direct concerns about separation of powers than subpoenas directed either at Congress or at the President and therefore provide a more useful model for a privilege mediating federal/state relations.

These limitations reflect the careful tailoring of the privilege to achieve its purpose of protecting confidentiality without unduly inhibiting the truth-finding process of litigation. Without holding that a deliberative process privilege does protect state legislators, we therefore reject the district court's assumption that a privilege protects all state legislative documents which may somehow reveal the "thought processes" of state legislators. Confidentiality concerns do not sweep so broadly. If a deliberative process privilege does protect state legislators, it is limited to communications involving opinions, recommendations or advice about legislative decisions. In addition, severable, factual material cannot be privileged.

In this case, the U.S. Attorney has repeatedly disclaimed interest in confidential deliberations and has stated that he seeks only hard evidence. Most if not all of the documents sought in this case are notes, summaries and transcripts of interviews that are unlikely to contain deliberative communications. We therefore suspect that the district court will be able to resolve any dispute about confidential portions of subpoenaed material without depriving the Grand Jury of the materials it seeks merely by exempting or excising any confidential deliberations that the documents contain. If necessary, the court may order *in camera* inspection of disputed documents. *See Kerr v. United States District Court*, 426 U.S. 394, 406 (1976) ("*in camera* review is a highly appropriate and useful means of dealing with claims of governmental privilege").

V. *Conclusion*

For the foregoing reasons, the order of the district court limiting the subpoena will be reversed and the case remanded for proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE: GRAND JURY SUBPOENA) Misc. No. 86-027

MEMORANDUM

This case presents what is apparently a question of first impression regarding the power of a federal grand jury to subpoena information from a duly constituted select committee of the state legislature. We are here called upon to decide whether members of the Pennsylvania House of Representatives who are not themselves the target of a federal criminal investigation may assert a privilege of non-disclosure, based on constitutional Speech or Debate considerations, against a federal grand jury subpoena.

The following facts are undisputed.[1] The House of Representatives of the General Assembly of the Commonwealth of Pennsylvania (the House), through its Select Committee to Investigate Compliance With the Steel Products Procurement Act (the Committee) has for approximately a year been investigating, *inter alia*, alleged improprieties concerning the procurement of granite for the expansion of the state capitol in Harrisburg, Pennsylvania. Transcript at 3. More specifically, the claimed wrongdoing has occurred in connection with sole source no-bid contracts, including supply and fabrication agreements. *Id*. That investigation is ongoing, *id*., and includes fact-finding in the nature of calling witnesses to appear before the Committee as well as conducting interviews through investigators hired by the Committee. *Id*. at 4.

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1. On January 17, 1986, this court heard oral argument on the instant Motion to Quash Subpoena, following which we stayed enforcement of the subpoena for a period of ten days, later extending the stay through January 31, 1986. At oral argument the parties entered into stipulations of fact, disputing only the legal issues. References herein to the transcript of that proceeding shall be designated as "Transcript".

At the invitation of the Pennsylvania Department of General Services,[2] the United States Attorney for the Middle District of Pennsylvania (hereinafter the United States Attorney or the United States) convened a grand jury to investigate the alleged improprieties. Affidavit of James J. West, Pars. 1 and 2. On January 15, 1986, the grand jury issued a subpoena directed to Nicholas Colafella, Representative of the 15th District, in his capacity as Chairperson of the Committee, or to the Records Custodian of the Committee, requesting the production of the following materials:

> 1. Memos, reports, summaries, interview notes, record review notes, correspondence and any other documents of an investigative nature compiled, adopted, prepared or sent and received by any committee investigator including, but not limited to, the listed individual and companies named on the attached list.
>
> 2. Agenda, minutes, summaries and all transcripts of public and private hearings, along with copies of all documents or exhibits referred to in said transcripts, summaries, agenda or minutes during the testimony or in comments by committee members or staff.

On January 17, 1986, Nicholas Colafella and several other persons[3] filed the instant Motion to Quash that subpoena,

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2. On January 10, 1986, Walter Baran, Secretary of the Department of General Services, wrote to the United States Attorneys for the Western and Middle Districts of Pennsylvania requesting that their offices and the Federal Bureau of Investigation "initiate an immediate criminal investigation in order to ascertain whether any conduct enegaged in by or between the . . . contractors or subcontractors (involved in the "purchasing, handling and finishing of the granite") are [sic] in violation of Federal or State Law". Letter attached to Affidavit of James J. West, United States Attorney, submitted in opposition to Motion to Quash ("*Schofield* Affidavit").

3. The other movants are K. Leroy Irvis, Speaker of the House; James J. Manderino, Majority Leader of the House; Mathew J. Ryan, Minority Leader of the House; and the Bi-Partisan Committee for the Administration of the House.

contending that its enforcement would contravene the doctrine of legislative immunity mandated by the Speech or Debate Clause.

This court has the power to quash or modify a subpoena duces tecum under Rule 17(c) of the Federal Rules of Criminal Procedure.[4] Courts have emphasized the importance of this power in view of the fact that "[a]lthough grand jury subpoenas are issued in the name of the district court, they are issued pro forma and in blank to anyone requesting them without prior court approval or control". *In re Grand Jury Matters*, 751 F.2d 13, 16 (1st Cir. 1984). Thus, because these subpoenas are "in fact almost universally instrumentalities of the United States Attorney's office or of some other investigative or prosecutorial department of the executive branch", *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 90 (3d Cir. 1973), practical responsibility for preventing abuse of the subpoena power and for "controlling grand jury excesses" lies with this court. *In re Pantojas*, 628 F.2d 701, 705 (1st Cir. 1980); *In re Grand Jury Matters*, 751 F.2d at 16.

The Third Circuit has said that because "a presumption of regularity attaches to the grand jury's proceedings, and hence to a grand jury subpoena. . . . The party objecting to enforcement has the burden of making some showing of irregularity". *Schofield I*, 486 F.2d at 92. However, the United States must make a preliminary showing by affidavit, indicating that each item sought is "(1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose". *In re Grand Jury Proceedings*, ("*Schofield II*"), 507 F.2d 963, 966 (3d Cir. 1975), *cert. denied*, 421 U.S. 1015 (1975). The *Schofield* cases "soundly rejected any contention that the district court should 'rubber stamp' petitions for the enforcement of grand jury subpoenas". *Schofield II*, 507 F.2d at 964.

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4. Fed.R.Crim.P. 17(c) provides:

A subpoena may . . . command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or excessive.

The grand jury's investigative powers are "necessarily broad . . . [b]ecause its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments". *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

> Hence, the grand jury's authority to subpoena witnesses is not only historic, but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence', except for those persons protected by a constitutional, common-law, or statutory privilege, is particularly applicable to grand jury proceedings.

Id. (Citations and footnote omitted.) Thus, the grand jury's right to "every man's evidence" is substantively limited only by express privileges, although under Federal Rule of Criminal Procedure 17(c) this court may also quash or modify a subpoena which appears to be unreasonable or oppressive in its demands. *In re Grand Jury Matters*, 751 F.2d at 17.

We proceed now to address the claim of privilege at issue in this case, which arises from the Speech or Debate clauses of the United States and Pennsylvania Constitutions. As a preliminary matter, although we note that the federal and state provisions are congruent,[5] we decline to decide this case under the Pennsylvania Constitution, despite movants' urging that we do so. See Movant's Responsive Brief (hereinafter cited as Movant's Brief) at 6-7. In *United States v. Craig*, 528 F.2d 773 (7th Cir. 1976) (*Craig I*), *cert. denied*, 425 U.S. 973 (1976), *concurrence adopted as opinion of en banc court*, 537 F.2d 957 (7th Cir. 1976) (*Craig II*), *cert. denied sub nom. Markert v. United States*, 429 U.S. 999 (1976), the court established that the State Constitution was inapplicable to a state legislator's claim of

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5. The United States Constitution, Art. I, §6, cl. 1, provides that "for any Speech or Debate in either House, [the Members of Congress] shall not be questioned in any other place". This language is virtually identical to the provision embodied in the Pennsylvania Constitution, Art. 2, §15 which states, in reference to the Members of the General Assembly, that "for any speech or debate in either House they shall not be questioned in any other place".

privilege in a federal criminal prosecution. This was so because the Federal Rules of Evidence and the Federal Rules of Criminal Procedure contemplated "that the admissibility of evidence in criminal cases in federal courts would be governed by Federal law and would not be dependent upon diverse state laws, including state constitutional provisions". *Craig I*, 528 F.2d at 776. *See also Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 404 (1979) (recognition of immunity for state legislators reflected the court's interpretation of federal law; the decision "did not depend on the presence of a speech or debate clause in the constitution of any state"). Accordingly, we do not address the applicability of the Pennsylvania Constitution's Speech or Debate provision.

Furthermore, the Federal Constitution's Speech or Debate provision is not directly applicable to members of a state legislator. *Lake Country Estates*, 440 U.S. at 404. However, state legislators may in some circumstances invoke the protection of common law immunity under the federal clause. *Id.*; *Star Distributors, Ltd. v. Marino*, 613 F.2d 4, 6 (2d Cir. 1980); *Craig I*, 528 F.2d at 782 ("The protection afforded state legislators from liability under federal law for acts done in their legislative roles . . . is not based upon the speech or debate clause of the Federal Constitution . . . a clause that applies only to Congress, but rather upon the common-law doctrine of official immunity").

Thus, the precise question before this court is whether movants are here entitled to invoke common-law immunity from the effects of the federal grand jury subpoena. Federal Rule of Evidence 501 provides in full that:

> Except as otherwise required by the Constituion of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, *the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience*. However, in civil actions and proceedings, with respect to an element of a claim or

> defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

F.R.E. 501 (emphasis supplied).

We turn now to an examination of the principles of the common law in the Speech or Debate clause area to determine whether, "in the light of reason and experience", those principles should apply to this case.

The Supreme Court has traced the history and purpose of the Speech or Debate provision thus:

> The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. . . . In 1689, the Bill of Rights declared in unequivocal language: 'That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or place out of Parliament'.
>
> Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. . . . The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense' . . . . The provision in the United States Constitution was a reflection of political principles already firmly established in the States.

Tenney v. Brandhove, 341 U.S. 367, 372-73 (1951). *See also United States v. Helstoski*, 442 U.S. 477, 491-92 (1979); *United States v. Johnson*, 383 U.S. 169, 178 (1966).

In view of these important functions of the Clause, the cases establish that it is to be read broadly, "to include not only 'words spoken in debate', but anything 'generally done in a session of the House by one of its members in relation to the business before it' ". *Johnson*, 383 U.S. at 179 (citations omitted); *United States v. Meyers*, 432 F.Supp. 456, 458 (W.D. Pa. 1977). While "the heart of the Clause is speech or debate", it also includes other matters which are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House". *Gravel v. United States*, 408 U.S. 606, 625 (1972). The Clause "protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts", *United States v. Brewster*, 408 U.S. 501, 525 (1972), and legislative fact-finding is such a protected act. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1974); *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976). In short, "[r]ather than giving the Clause a cramped construction", the Supreme Court has "sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator". *Gravel*, 408 U.S. at 618.

Of particular relevance to the decision at bar are those instances in which the federal courts have accorded this immunity to state legislators. In *Star Distributors, Ltd. v. Marino*, 613 F.2d 4, the Second Circuit affirmed the denial of a preliminary injunction which had sought to restrain enforcement of a subpoena issued by a state legislative committee. In so holding, the court stated that

> under our system of federalism, the role of the state legislature is entitled to as much respect as that of Congress. Congress may legislate on matters of national concern, while state legislators act on vital matters of local importance. The need for a Congress which may act free of interference by the courts is neither more nor less than the need for unimpaired state legislatures.

613 F.2d at 9. Noting that "[t]he Supreme Court has stated in dictum that 'the state legislative privilege . . . [is] on a parity with the similar federal privilege' under the Speech or Debate Clause, *United States v. Johnson*, 388 U.S. 169," the *Star Distributors* court concluded that the "shared origins and justifications" of the federal Speech or Debate provision and the doctrine of common-law immunity of state legislators from suit rendered the two doctrines parallel, in the absence of "good reason" for a contrary conclusion. 613 F.2d at 8. Thus, because the Supreme Court had held that the federal Speech or Debate provision barred a suit for injunctive relief against enforcement of a subpoena issued by a Senate committee, *Eastland*, 421 U.S. 491, state legislators were to be accorded a similar immunity. *Id.*

A salient difference in the scope of the privilege accorded to state legislators and that provided to members of Congress appears to be that the common-law doctrine does not immunize state legislators from federal criminal prosecution in connection with their legislative acts. In *United States v. Gillock*, 445 U.S. 360 (1980), the Supreme Court expressly stated that it had granted certiorari "to resolve a conflict in the Circuits over whether the federal courts in a federal criminal prosecution should recognize a legislative privilege barring the introduction of evidence of the legislative acts of a state legislator" charged with crime. 445 U.S. at 361-62. Having so stated the issue, the court declined to recognize such a privilege, finding that neither of the "two interrelated rationales" which underlie the Speech or Debate clause would support the granting of immunity. First, the separation of powers doctrine did not mandate the privilege because, under the Supremacy Clause, Federal interference into state legislative process was "not on the same constitutional

footing with the interference of one branch of the Federal Government in the affairs of a coequal branch". 445 U.S. at 370. The second rationale, which was the need to insure legislative independence, similarly gave way to preeminent federal criminal statutes. *Id.* at 371-72.

As this court reads *Gillock*, its holding was expressly confined to those situations in which a state legislator is charged with a federal crime or is the target of a federal criminal investigation. The court distinguished its decision on this basis from those of its precedents which had accorded immunity to state legislators in civil cases. 445 U.S. at 372. Thus, *Gillock* stands only for the proposition that "recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its *criminal statutes with only speculative benefit to the state legislative process*". *Id.* at 373 (emphasis added).[6] *See also United States v. Craig*, 528 F.2d 773, 783 (Tome, J., concurring) (principles of common-law immunity, cognizable under F.R.E. 501, protected a state legislator in a civil case but not in a criminal prosecution, because "immunity from civil but not criminal liability has been regarded as sufficient to achieve the purpose of the doctrine of official immunity, which is to promote independence and fearless discharge of duty on the part of the protected officials"). *But see United States v. Meyers*, 432 F.Supp. 456 (granting a state senator's motion to strike a

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6. Because we interpret *Gillock* in this manner, we must reject the United States' strenuous contention that that case is dispositive of the one before us. The United States Attorney contends that *Gillock* controls this case because the federal grand jury "has Constitutional and statutory authority to be investigating violation of federal criminal laws . . . and . . . since it has the power to act, it must prevail over the state legislatures' claims of a speech and debate privilege". Brief for United States at 7. We decline, however, to read *Gillock* so broadly. As we have noted, the Court therein expressly confined its holding to those cases in which the state legislator was the target of a criminal investigation. That situation implicated a much stronger federal interest than any that may be found in the case at bar, where the United States has stipulated that the Committee members are not themselves targets of the investigation. Transcript at 5-6. Accordingly, far from disposing of the present case, we find the *Gillock* holding to be inapposite.

portion of an indictment against him, because "the doctrine of legislative immunity is one of the fundamental principles of ordered Anglo-American liberty which is made binding on the States by virtue of the Fourteenth Amendment", and the "reasons and public purpose upholding" such immunity were "equally applicable to State and federal legislators").

Significantly, despite *Gillock's* admonition that no immunity is recognized for state legislators under criminal investigation, the Third Circuit has recently extended such protection to a Virgin Islands legislator. In *Government of the Virgin Islands v. Lee*, 775 F.2d 514 (3rd Cir. 1985), the court held that the Virgin Island's legislative immunity provision, contained in a statute found at 48 U.S.C. §1572(d), was "closely parallel" to the Speech or Debate Clause in terms of the purposes underlying the two provisions. Therefore, the territorial legislator was by statute accorded immunity from inquiry in federal court regarding his fact-finding and legislative activities, although the privilege did not bar inquiry into whether his activities were in fact legislative in nature. In so holding, the court reaffirmed that

> Fact-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation. As such, fact-finding occupies a position of sufficient importance in the legislative process to justify the protection afforded by legislative immunity. Legislators must feel uninhibited in their pursuit of information, for '[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change. . .' *McGrain v. Daugherty*, 273 U.S. 135, 175 (1972).

Lee, 775 F.2d at 521-22. Although the result in *Lee* was based on the existence of a specific federal statute which afforded immunity to Virgin Islands legislators, the court's stress on the importance of immunity to the legislative fact-finding process is instructive, and its reasoning is directly apposite to our own inquiry.

Finally, we find a useful analogy in a line of cases in which state revenue officials have been accorded a qualified common-law privilege from disclosure of information sought by a federal grand jury investigating non-tax crime. In *In re Hampers*, 651 F.2d 19 (1st Cir. 1981), the court held that the Massachusetts Commissioner of Revenue would not be required to comply with a federal grand jury subpoena because a state statute prohibited disclosure of tax return information except under specified circumstances. Rejecting, *inter alia*, the argument that deference was owed to the grand jury or that disclosure was mandated by virtue of its 'mantle of confidentiality', the court held that the nondisclosure statute created a privilege cognizable under F.R.E. 501 in a federal proceeding.

The *Hampers* court relied heavily on *American Civil Liberties Union of Mississippi v. Finch*, 638 F.2d 1336 (5th Cir. 1981), which mandated a balancing of the policies underlying the privilege against the policies favoring disclosure. *Finch*, 638 F.2d as 1343. Engaging in such a balancing process, the court noted that

> honoring such a privilege in federal court will usually involve some cost to the federal interest in seeking the truth in Federal question cases. It makes a difference whether the federal interest in seeking full disclosure is a weak or a strong one. . . . Assisting federal grand juries in their criminal investigations is generally a strong interest. But where the information sought is only corroborative of what investigators have alleged on the basis of other information, is seemingly ascertainable from sources other than state tax returns, and addresses only one aspect of a non-tax related crime, the federal interest looms less.

Id., 651 F.2d at 22.

The court balanced the interests involved by asking, *inter alia*, whether "the *injury* that would inure to the relation by the disclosure of the communications [would be] *greater than the benefit* thereby gained for the correct disposal of litigation". *Id.* at 23 (emphasis in original). Concluding that the state's asserted privilege was "intrinsically meritorious in our independent

judgment", the court determined that the balance tipped in favor of the state's interest in non-disclosure:

> We can easily see that if a state tax return contained the only key to resolving a serious federal crime, the balance would tilt in favor of the federal government. . . . But if a return contained information that would be easily obtained elsewhere and at best would constitute only cumulative evidence impeaching one of several witnesses, we might have second or third thoughts.

Id.

Alluding to the "value in preserving . . . the postures of comity and deference arising from federalism", the court concluded thus:

> We therefore hold that appellant in this case enjoys a qualified privilege under Rule 501 because of the state nondisclosure statute and that, in order to enforce a subpoena in a federal criminal investigation, a federal grand jury must proffer reasonable cause to believe that a federal crime has been committed, that the information sought will be probative of a matter at issue in the prosecution of that crime, and that the same information or equally probative information can not be obtained elsewhere through reasonable efforts.

Id.[7] *See also In re Cruz*, 561 F.Supp. 1042 (D. Conn. 1983); *In*

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7. The United States Attorney contends that *Hampers* is inapposite to this case for several reasons. While he concedes that *Hampers* and its progeny "based their holding on the finding of a qualified common-law privilege under Rule 501", Brief for United States at 16, he nevertheless perseveres in his claim that, under *Gillock*, no such common-law privilege exists in the speech or debate area. However, we have already rejected this argument, *supra* n. 6; as in our view *Gillock* does not control this case.

Secondly, the United States would distinguish the *Hampers* line of cases because they deal with "tax matters where both State and federal policy requir[e] confidentiality and the public in general ha[s] a legitimate expectation that their state and federal tax records would remain confidential". Brief for United States at 16. We do not find this distinction persuasive because the policy of legislative integrity underlying the Speech or Debate Clause is no less

(Footnote Continued)

re Grand Jury Empanelled January 21, 1981, 535 F.Supp. 537 (D. N.J. 1982) (citing *Hampers* and reaching similar result); *but see United States v. Blasi*, 462 F.Supp. 373 (M.D. Ala. 1979) (state non-disclosure statute deemed not to have any direct bearing on controversy regarding grand jury subpoena).

This court is persuaded that a similar common-law privilege should be recognized in the circumstances of this case. On the whole, we find that the policy underlying the asserted privilege outweighs that favoring disclosure. The legislative fact-finding in which the Committee is engaged falls squarely within the ambit of speech or debate protection, and therefore implicates fully the values of legislative independence which underlie the

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(Footnote Continued)

important than the requirement of confidentiality in tax matters.

In a related vein, the United States points out that *Hampers* involves the 'required report' privilege recognized "when a state law requires citizens to do something under a promise of confidentiality". Brief for United States at 16. The United States contends that the Third Circuit expressly rejected the required report privilege under Rule 501 in *Matter of Grand Jury Impaneled January 21, 1975 ("Freedman and Cortese")*, 541 F.2d 373 (3d Cir. 1976).

We disagree, however, with the United States Attorney's reading of *Freedman and Cortese*. Although the Third Circuit there held that a federal grand jury subpoena was enforceable against the Prothonotary's Office of the Court of Common Pleas of Philadelphia, despite a confidentiality rule adopted by that court, it reached this conclusion by virtue of a balancing process very similar to that established in *Hampers*:

> The state's interest in voluntary compliance (with the filing requirement) will not be seriously impaired by enforcing the instant grand jury subpoena. . . . On balance, we think that any incidental and speculative effect enforcement of the subpoena would have on voluntary compliance is outweighed by the grand jury's need for this evidence in order effectively to conduct this investigation.

541 F.2d at 382-83. Furthermore, the court expressly left open the possibility of a different outcome of this balancing:

> We . . . have not decided that a federal court will never recognize a state required report privilege as a matter of federal common law in a federal grand jury investigation. Perhaps there may be instances that will present compelling justifications for denying a federal grand jury relevant information; such justifications were not presented here.

Id. at 383. Thus, *Freedman and Cortese* supports the proposition that a grand jury subpoena may be quashed or modified if the state body to which the subpoena is directed presents sufficiently compelling reasons for this result.

privilege. Furthermore, because none of the Committee members is a target of the investigation, to recognize the privilege will not directly thwart the federal interest in criminal prosecution. Accordingly, we find that the privilege asserted by the Committee is "intrinsically meritorious in our independent judgment". *Hampers*, 651 F.2d at 22.[8]

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8. Moreover, we reject the United States' contention that this immunity is merely a use privilege and does not shield legislative action from discovery by the grand jury. In support of this argument the United States Attorney relies on *In re Grand Jury Investigation ("Eilberg")*, 587 F.2d 589 (3d Cir. 1978) which in turn cited *Gravel v. United States*, 408 U.S. 606. We think the United States' reliance on these cases is misplaced.

In *Eilberg*, the Third Circuit affirmed the district court's refusal to quash a federal grand jury subpoena which sought to obtain the telephone records of a Member of Congress who was himself a target of the investigation. The court stated that "the Speech or Debate Privilege is at its core a use privilege", 587 F.2d at 596, but continued that "[t]o be sure, the Speech or Debate Clause has also been construed to permit a legislator to refrain from *testifying* about certain legislative acts". *Id.* To that effect, the court cited the Supreme Court's statement in *Gravel* that "Senator Gravel may not be made to answer — either *in terms of questions* or in terms of defending himself from prosecution — for the events that occurred at the subcommittee meeting". *Id.* at 596, citing *Gravel*, 408 U.S. at 616 (emphasis supplied in *Eilberg*). The Third Circuit noted that *Gravel*, had established that "a Senator, even a non-target, could not be compelled to testify before a grand jury about a legislative act", *id.*, and that this privilege extended to legislative aides. It continued

> But to the extent that the Speech or Debate Clause creates a *testimonial* privilege as well as a *use* immunity, it does so only for the purpose of protecting the legislator and those intimately associated with him in the legislative process from the harassment of hostile questioning. It is not designed to encourage confidences by maintaining secrecy, for the legislative process in a democracy has only a limited toleration for secrecy. . . . As we have said . . . the privilege when applied to records or third-party testimony is one of non-evidentiary use, not of non-disclosure.

Id. at 597 (citations omitted) (emphasis in original).

In this court's view, *Eilberg* is inapplicable to the present case because here the subpoena is directed to the legislator himself, rather than to a third party. Therefore, testimonial rather than use immunity applies. As we understand the Committee's argument, it is not attempting to assert the privilege on behalf of others, but rather is claiming that immunity is necessary to protect *its own legislative process*. Accordingly, the United States' argument

(*Footnote Continued*)

More specifically, we conclude on the basis of the record before us that the injury that would inure to the integrity of the state legislative process by our enforcement of this subpoena outweighs the benefit to be gained by the federal prosecutorial authorities.

The United States Attorney has stated that

> it is the intent of the subpoena to require the production of documents in the form of memorandums, reports, summaries, interview notes and record review notes dealing with an investigation into the purchase of granite for use in the capitol addition project. Particularly statements dealing with interviews conducted of a list of witnesses that are attached to that subpoena or statements developed by the investigators or attorneys acting as investigators hired by the committee and, again, dealing only with the investigation insofar as it relates to the purchase of granite for use in the capitol project.
>
> The second paragraph of the subpoena is aimed at transcripts of both public and private hearings that the committee has conducted along with copies of all documents or exhibits referred to in said transcripts of either the public or private hearings. That is the heart of the subpoena.

Transcript at 5. Such materials, we think, would convey the impressions and thought processes of the Committee members, and are thus central to the legislative fact-finding process. While the Committee may divulge this information voluntarily if it chooses to do so, and the United States concedes that it has, Transcript at 7-8, this court declines to require such disclosure by enforcing the subpoena. To compel the Committee to divulge this information would represent an impermissible intrusion

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(Footnote Continued)

that the Committee is attempting to "benefit third parties" who are committing crimes by "transfer[ing] legislative privilege" to them, Brief for United States at 15, n. 1, entirely misconstrues the thrust of the Committee's claim. To reiterate: the Committee seeks to protect itself, not the targets of its investigation.

into the legislative process and would render the status of the Committee little more than an investigative tool of the grand jury. In this regard, we note that

> It is the responsibility of the court to preserve the grand jury's historic role as a bulwark between the individual and the state. Hence, the federal courts have broad supervisory power to prevent grand jury abuse, including the granting of relief from unreasonable and oppressive grand jury process. . . .when federal district judges are confronted with appropriate motions to quash, limit or enforce grand jury subpoenas, they can and indeed should, exercise their responsibility to prevent grand jury abuse by insisting that the government invoke the subpoena power only when there is solid foundation for doing so.

In re Grand Jury Matter, Gronowicz, 764 F.2d 983, 991 (3d Cir. 1985) (Becker, J., concurring) (citations omitted).

We are aware that our decision may prove detrimental to the grand jury's investigation. Although the United States has conceded that the Federal Bureau of Investigation "certainly . . . could conduct an investigation" of its own "in an attempt to develop what the Committee has developed and then could present it to the grand jury", Transcript at 8, it is also probably true that

> there can yet be no guarantee that a complex investigation involving multiple witnesses and numerous exhibits can be totally duplicated even by the best of investigative agencies, and the possibility is obvious that critical inculpatory evidence or exculpatory evidence obtained in interview reports, closed hearing testimony, or multiple exhibits

may be lost if the subpoena is not enforced. Brief for United States at 19. However, our balancing of this potential detriment against the clear and impermissible intrusion into the legislative sphere which the subpoena represents compels our conclusion

that, with respect to most of the information sought, enforcement must be denied.[9]

We will except from our holding certain information the procurement of which, we find, would not intrude unduly into the legislative process. The grand jury may obtain from the Committee information regarding the identity of witnesses interviewed. Furthermore, should the grand jury become aware, in the course of its own investigation, of documents or exhibits authored by a witness or by a third party other than the members of the Committee, which documents or exhibits are determined to be in the Committee's possession and which cannot be obtained by any other means, then the subpoena power may be employed. With respect to all other matters, the Motion to Quash the subpoena will be granted.

/s/ Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: January 31, 1986

9. This conclusion is buttressed by the contentions of the Committee that much of the information sought is readily available from other sources. Although those sources are accessible to the FBI, they have apparently not been fully exploited. Affidavit of Reizdan Moore, Counsel to the Committee, annexed as Exhibit D to Movant's Brief, Par. 3. Furthermore the Committee has cooperated to a considerable extent with the federal investigation and has voluntarily provided substantial information, including the names of witnesses and the impressions of Committee Members regarding the investigation. *Id.* at Pars. 4, 5. Finally, the counsel for the Committee states that "all relevant and pertinent committee documents, which have not been made public, will be made public by February 6". *Id.* at 10. Thus this court cannot see any pressing read for the enforcement of this subpoena.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE: GRAND JURY SUBPOENA) Misc. No. 86-027

ORDER

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT the Motion to Quash Subpoena is granted, EXCEPT with respect to the following materials:

1. The identities of all witnesses;

2. Any exhibits or documents of which the grand jury may become aware, in the course of its investigation, authored by witnesses or by third parties other than the Committee or its members, which are in the possession of the Committee and which cannot be obtained from any other source.

With respect to this information, the subpoena, as modified, shall be enforced.

/s/ Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: January 31, 1986

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-5144

IN RE: GRAND JURY IN THE MATTER OF: GRANITE PURCHASES FOR STATE CAPITOL — GRAND JURY SUBPOENA NUMBER 86-1
UNITED STATES OF AMERICA,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Misc. No. 86-027)

Argued August 19, 1986

Before: BECKER and MANSMANN, *Circuit Judges*
and TEITELBAUM, *District Judge**

ORDER

The United States has appealed from an order of the United States District Court for the Middle District of Pennsylvania, granting partial relief on a motion to quash a Federal Grand Jury subpoena. The subpoena, served upon the chairman of a Pennsylvania legislative committee, seeks records of the Committee's investigation into bribery and alleged political corruption in connection with certain state construction contracts. The United States contends that the district court, in modifying the subpoena, erred in fashioning a balancing test predicated on a

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* The Honorable Hubert I. Teitelbaum, United States District Judge for the Western District of Pennsylvania, sitting by designation.

federal common law speech or debate privilege under Rule 501 of the Federal Rules of Evidence.

The subpoena called for all records in the hands of the Committee "*relating to* an investigation of the purchase of granite used in the Capital addition project as follows . . . ." (Emphasis supplied.) Following this language, the subpoena specified many kinds of documents and a specific list of individuals with whose testimony the grand jury is concerned. The subpoena also stated that compliance could be by mail. In explaining the subpoena at the initial hearing on the legislature's motion to quash the subpoena, the U.S. Attorney stated that, if the Committee would represent that there were no "vital and relevant" documents requested in the subpoena that had not been made public, he would "withdraw [his] subpoena and abide the event." (Appendix at 51.) The U.S. Attorney also stated that he had no interest in legislative thought or work processes or material protected by attorney-client privilege. (Appendix at 57.) Thereafter, the court stayed enforcement of the subpoena and permitted the parties to file briefs. On January 31, 1986, the district court issued its memorandum decision and order modifying the subpoena, and the government's appeal followed.

On May 22, 1986, Reizden Moore, counsel to the Committee, represented in sworn affidavit that "all relevant or remotely relevant information regarding payoffs which was obtained on or before February 6, 1986, has been released to the public and turned over to the United States Government as promised at the hearing before Judge Rambo." (*See* Appellee's Br. at 48.) At oral argument before this Court, on August 19, 1986, the Assistant U.S. Attorney conceded that he had "no reason to believe that the Committee has not turned over everything within the ambit of the subpoena as narrowed by the government at the evidentiary hearing." However, he also stated that the Grand Jury remained concerned that the Committee's notion of relevant documents might differ from the Grand Jury's, so the government sought the right to work out some process by which it could verify that the two notions of relevancy were the same.

Counsel for the Committee rejoined by stating that the Committee had turned over all the evidence the U.S. Attorney had said he wanted in arguments before the district court, but he refused to accede to the government's demand for "verification." The panel, after hearing oral argument on the question of mootness and on the merits, suggested to counsel that they attempt to resolve their apparently minor differences and report to the Court in writing.

The parties' responses, which are attached as an appendix to this Order, reflect that differences remain. Essentially the Grand Jury acknowledges that it may have received virtually all the information it desires, but it expresses the view that some "reports and summaries of witness interviews containing factual information relative to the Granite kickback probe" may not have been released, in particular Committee investigator notes or summaries of witness interviews. The Grand Jury notes that such summaries may have value even if their substantive information has been released in another form and states that it requested all documents relating to the investigation regardless of their form. The U.S. Attorney also states, however, that any materials not produced "would probably not be of great significance to the government's investigation at this juncture." Furthermore, apart from declaratory relief for future controversies of this kind, the U.S. Attorney does not specify what exactly he expects to happen if we reinstate the subpoena, in the light of the Committee's claim to have complied. In response, counsel for the Committee refuses to enter into the stipulation sought by the U.S. Attorney. He states that the Committee has provided all the information requested by the U.S. Attorney's "amended demand" and claims that the U.S. Attorney now seeks documents of the Committee staff's "impressions and conclusions" which he had previously forsworn.

In the face of these bewildering statements, the panel cannot determine what the subpoena, as amended, now requests and whether a reinstatement of the subpoena would entitle the U.S. Attorney to receive relief he does not now have. Accordingly, the panel feels itself incapable of determining whether a live case or controversy remains to be decided;

furthermore, it lacks the facilities for resolving this question. If the case must be decided on the merits, it presents difficult and sophisticated questions on the frontier of privilege law. It is therefore ORDERED that this case be and it is hereby remanded to the district court for the purpose of making a determination as to mootness. This Court will retain jurisdiction meanwhile.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Clerk

DATED: September 25, 1986

Certified as a true copy and issued in lieu of a formal mandate on October 17, 1986.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals, for the Third Circuit.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE: GRAND JURY SUBPOENA NO. 86-1	:	MISC. NO. 86-027
IN THE MATTER OF GRANITE PURCHASES FOR STATE CAPITOL	:	

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

The House of Representatives of the General Assembly of the Commonwealth of Pennsylvania (the House), through its Select Committee to Investigate Compliance with the Steel Products Procurement Act (the Committee) has for a few years been investigating, *inter alia*, alleged improprieties concerning the procurement of granite for the expansion of the state capitol in Harrisburg, Pennsylvania. More specifically, the claimed wrongdoing has occurred in connection with sole source no-bid contracts, including supply and fabrication agreements. That investigation is ongoing and includes fact-finding in the nature of calling witnesses to appear before the Committee as well as conducting interviews through investigators hired by the Committee.

At the invitation of the Pennsylvania Department of General Services, the United States Attorney for the Middle District of Pennsylvania (hereinafter the United States Attorney or United States) convened a grand jury to investigate the alleged improprieties. On January 15, 1986, the grand jury issued a subpoena directed to Nicholas Colafella, Representative of the 15th District, in his capacity as Chairperson of the Committee, or to the Records Custodian of the Committee, requesting the production of the following materials:

> 1) Memos, reports, summaries, interview notes, record review notes, correspondence and any other documents of

an investigative nature compiled, adopted, prepared or sent and received by any committee investigator including, but not limited to, the listed individual and companies named on the attached list.

2) Agenda, minutes, summaries and all transcripts of public and private hearings, along with copies of all documents or exhibits referred to in said transcripts, summaries, agenda or minutes during the testimony or in comments by committee members or staff.

On January 17, 1986, Nicholas Colafella and several other persons filed a Motion to Quash that subpoena, contending that its enforcement would contravene the doctrine of legislative immunity mandated by the Speech or Debate Clause.

By Memorandum and Order dated January 31, 1986, this court granted the Motion to Quash with two exceptions. The United States appealed that Order. During the course of the oral argument conflicting representations were made to the panel as to whether the material produced voluntarily by the legislative committee represents all the evidence sought by the subpoena, or whether a reinstatement of the subpoena would entitle the United States Attorney to receive relief he does not now have.

The Court of Appeals remanded the case to this court for the purpose of making a determination as to mootness. Upon review of the Affidavit of Reizdan Moore, the Supplemental Affidavit of the United States, the United States' Brief on Remand and its attached exhibits, this court finds that a case or controversy still exists.

The specific items the United States seeks which have not been voluntarily turned over by the legislative committee, and which fall within the scope of the subpoena, are as follows:[1]

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1. The subject matter of all document requests pertain to the entire investigation of the Select Committee's investigation of compliance with the Steel Products Procurement Act. The request excludes intra-committee communications separate and apart from factual descriptions of an interviewee's statement.

1) memorandums, summaries of interviews, interview notes, reports of interviews with Carl Lunderstadt, John Scott, Robert Billingsly, Mr. Bernardo.

2) memorandums, summaries, notes, reports of interviews of potential witnesses interviewed by the committee's investigator, Stanley Gochenour and the committee's attorney, Reizdan Moore.

Consistent with the Memorandum and Order of this court dated January 31, 1986, the above items are subject matter covered by the Motion to Quash and do not fall within the enumerated exceptions.

/s/ Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: December 12, 1986

APPENDIX F

Supreme Court of the United States

No. A-155

NICHOLAS COLAFELLA, K. LEROY IRVIS, ET AL.,
Applicants,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 4, 1987.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 24th day of August, 1987.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-5144

IN RE: GRAND JURY

IN THE MATTER OF:
GRANITE PURCHASES FOR
STATE CAPITAL — GRAND JURY
SUBPOENA NUMBER 86-1

United States of America,
Appellant

(D.C. Misc. No. 86-027)

SUR PETITION FOR PANEL REHEARING AND REHEARING IN BANC

PRESENT: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges* and TEITELBAUM, *District Judge**

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

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* The Honorable Hubert I. Teitelbaum, United States District Judge for the Western District of Pennsylvania, sitting by designation, as to panel rehearing only.

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Edward R. Becker
Circuit Judge

DATED: July 6, 1987